incidental to his obligations, the child would often have been taken from its parent; yet this will never be done unless the parent is morally unfit to control his child.[7] Again, even after a parent has been deprived of the custody of his offspring and owes it no parental duties, the courts have repeatedly recognized his right of access to his child.[8] A recent New York case furnishes an extraordinary illustration of this tendency of the courts to recognize the independence of the parent's rights. The custody of children was taken from their aunt, a Protestant, and awarded to their grandmother, a Catholic, solely because the father was a Catholic. By the same decision the father's application for their custody was refused on the ground that his misconduct had forfeited his right to it. *Matter of Jacquet*, 40 N. Y. Misc. 575. The court clearly proceeded on the theory that a parent's rights are not merely incidental to his obligations, for, although the father was deprived of the custody of the children and relieved of his parental obligations, yet he was still conceded the right to determine their religious training.

It seems apparent that although the reaction against the barbarities of the old theory of the parental relation has led the courts to lay stress upon the rights of the child, they have in effect proceeded upon the theory that the rights of parent and child are respectively independent, springing separately from the fact of parentage. This view seems both legally sound and in harmony with the modern, civilized conception of the family relation.

REDUCTION OF BENEFICIAL INTEREST OF AN ASSIGNEE OF A TRUSTEE BECAUSE OF THE LATTER'S DEFALCATION. — If a trustee, who is also a beneficiary under the trust, commits a defalcation, the other beneficiaries may satisfy the default out of the trustee's interest.[1] If, however, before committing the default, the trustee has assigned his interest, a different question arises. In England, it appears to be settled that even in that case, the other beneficiaries may take in advance of the assignee.[2] In America, it seems to have arisen for decision only once;[3] then the English rule was adopted without qualification. How the question would be treated in new jurisdictions is difficult to determine.

That a trustee should be obliged to diminish his beneficial interest in favor of the other beneficiaries to the extent of his default is undoubtedly a salutary rule. The English cases say that he must be regarded as having anticipated the payment to himself of his share.[4] This is obviously a fiction. A better explanation would seem to be that the trustee should not be allowed to set up his own default in order to diminish the shares of the other beneficiaries. It is but another of those stringent but beneficent rules that are aimed at maintaining undeviating rectitude on the part of fiduciaries. A different proposition is presented, however, when the trustee has previously assigned his interest. Obviously the case is not covered by the English reasoning, for, as the beneficial interest is no longer his, the trustee cannot be regarded as having paid it. Nor, now that the interest to be diminished belongs to an innocent third person, can the other beneficiaries contend that the trustee will only suffer the consequences of his

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[7] See Hanson *v.* Watts, 40 Ind. 170.

[8] Miner *v.* Miner, 11 Ill. 43.

[1] Jacubs *v.* Rylance, L. R. 17 Eq. 341.

[2] Doering *v.* Doering, 42 Ch. D. 203.

[3] Belknap *v.* Belknap, 87 Mass. 468.

[4] Jacubs *v.* Rylance, *supra*.

own default; nor will the rule exercise a restraining influence upon the trustee. The only possible basis for the rule is public policy; the argument being that to fully protect trust estates an assignee knowing the fiduciary position of his assignor, should be obliged to take the risk of a possible defalcation. It is submitted, however, that the policy of the situation should be clearly determined before fastening upon the assignee such a risk. In this case the policy is so doubtful that it offers no real justification for the rule.

The language of a recent Victoria case following the established English rule would make the rule even more comprehensive. *Cumming* v. *Austin*, 28 Vict. L. R 622. The court intimates that the assignee should be mulcted even where the assignment occurred before the assignor became trustee. The objections to the more restricted English rule here apply with even greater force. In addition, the argument of public policy fails entirely. For, even granting the rule as enforced in England, it would seem to be an unwarranted step to say that an assignee must be taken to have anticipated his assignor's becoming a trustee, and therefore to have assumed the risk of a future default. In addition, since every beneficiary may become a trustee, the existence of such a rule would seriously affect the freedom with which equitable interests might be transferred. The more restricted rule could only affect in that way the few cases of assignments by trustees. The one English decision on the point is contrary to the *dictum* in the principal case.[5] It is to be hoped that when the question arises for decision in the future, that *dictum* may be distinctly repudiated.

THE ALABAMA FRANCHISE CASE. — Much attention has been attracted by the decision in the United States Supreme Court of the case of the negroes who applied for relief from what they claimed was the unconstitutionality of the recent Alabama franchise provisions. *Giles* v. *Harris*, 189 U. S. 475. The case is rather inadequately reported, and as a consequence there has been some hesitation as to the exact scope of the decision. The Alabama constitution provides for the registration of all electors, upon qualification according to certain requirements. An examination of the record from the circuit court discloses that the plaintiff, for himself and five thousand other negroes of the same county in Alabama, brought a bill for equitable relief against the defendants, the county registrars. The plaintiff alleged that he and his fellows were qualified under the requirements of the franchise provisions, but that the defendants denied them the right to register; further, that the constitutional franchise provisions are in contravention of the fourteenth and fifteenth amendments of the federal Constitution: wherefore he asked a decree placing his name on the registration list and declaring the whole registration scheme unconstitutional. A demurrer by the defendants was sustained on two grounds: first, that there was no federal jurisdiction; second, that the facts alleged do not come within the cognizance of equity. The plaintiff appealed to the Supreme Court of the United States under the statute [1] which allows certain questions to be brought before that court on direct appeal, among these questions being federal jurisdiction, and the constitutionality of a state constitution. The question of federal jurisdiction

[5] Irby *v.* Irby, 25 Beav. 632.

[1] 26 St. c. 517, § 5, p. 827, 828.